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Indiana Journal of Law and
Social Equality

Volume 5 | Issue 1

Article 4

Fall 11-4-2016

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Publication Citation

Mateo Forero, *Drawing the Line for Democratic Choice: How the Petition Clause Can Restore a Citizen's Right to Participate in Commission-Driven Redistricting*, 5 Ind. J.L. & Soc. Equality 75 (2016).

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Drawing the Line for Democratic Choice: How the Petition Clause Can Restore a Citizen's Right to Participate in Commission-Driven Redistricting

Mateo Forero*

ABSTRACT

In this Article, I argue that commission-driven redistricting (and the “apolitical” process enshrined therein) frustrates a citizen’s right to meaningfully participate in electoral design. This right is fundamental, and has long been safeguarded by the First Amendment’s assertion that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” Accordingly, I propose that courts use the Petition Clause as a constitutional remedy against rules that abridge substantive public input in commission-driven redistricting. To illustrate this claim, I analyze how one commonly adopted commission rule—the ex parte contacts prohibition—limits democratic choice. Then, I examine how a court might deploy the First Amendment to repair the harm inflicted by the rule.

INTRODUCTION

What does Bullwinkle have in common with a broken-winged pterodactyl? According to the courts, both resemble congressional districts that were oddly drawn to achieve suspicious electoral outcomes.¹ Gerrymanders, as they are more commonly known, have long been the stuff of political intrigue. In large part, this is because state legislatures—the entities which usually produce them—are political by nature.²

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1 Diaz v. Silver, 978 F. Supp. 96, 113 (E.D.N.Y. 1997) (holding that the Bullwinkle shape of New York’s 12th congressional district was unconstitutional because it diluted the effect of Latino votes); Fletcher v. Lamone, 831 F. Supp. 2d 887, 902 n.5 (describing Maryland’s 3rd congressional district as “reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State”).

2 See Bernard Grofman & Thomas L. Brunell, *Redistricting*, in THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR 649, 651 (Jan E. Leighley ed., 2010) (noting that in most jurisdictions, redistricting “defaults to the legislature and the governor. For these states, redistricting is no different than passing state law. The state legislators pass new maps and rely on the governor to sign them into law”); WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 22 (10th ed. 2001) (“By and large, what the legislature brings to lawmaking is the power to represent the people and the authority to make social; what it can leave is its distinctive imprint on the policies recommended by others. Neither in what it brings to the process of making law nor in what it leaves in public policy is its power trifling”).

Indeed, the specter of partisan bias in redistricting is exactly what makes gerrymandering suspicious.³ But the close link between partisanship and electoral design is not a random one. Notably, Article I, Section 4 of the Constitution provides that the “times, places and manner of holding elections for . . . Representatives, shall be prescribed in each state *by the legislature thereof* . . .”⁴ Thus, it is by design that our Founding Fathers placed the task of drawing electoral maps in the hands of those closest to the people. Theirs was an institutional choice rooted in the vision of a pluralist and federalist republic.⁵

That choice, however, was seriously undermined by the U.S. Supreme Court in one of its recent decisions. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that a state may draw congressional districts through a freestanding agency—even though the text of Article I, Section 4 assigns that duty to its legislature.⁶ The Court reached this conclusion by interpreting “legislature” to mean “legislative power,” which includes prescription by direct democracy.⁷ Therefore, the Court found that an Arizona initiative assigning redistricting authority to an independent commission was a permissible exercise of the state’s “legislative power.”⁸ Rationalizing its decision, the Court stressed that

3 Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 601–09 (2002) (arguing that partisan gerrymanders harm democratic accountability, individual rights, and group-based interests); *and see* Grofman & Brunell, *supra* note 2, at 663 (noting that “it is common journalistic wisdom that redistricting is an important cause of the extreme ideological polarization between the two parties found in the U.S. House of Representatives and in many state legislatures”).

4 U.S. CONST. art. 1, § 4, cl. 2 (emphasis added). Although “legislature” has been interpreted broadly in Elections Clause jurisprudence, this is not without caveats. *See* Colorado General Assembly v. Salazar, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting) (“[T]o be consistent with Article I, Section 4, there must be *some limit* on the State’s ability to define lawmaking by excluding the legislature itself in favor of the courts” (emphasis added)).

5 James Madison, widely recognized as the philosopher of the Constitution, noted that “the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men whose influence over the people obtains for themselves an election into the state legislatures.” THE FEDERALIST NO. 45, at 287–88 (James Madison). Following Madison’s cue, Professor Franita Tolson has argued that partisan gerrymandering is federalism-reinforcing “because: 1) the states’ redistricting power links officials in separate spheres of government; and 2) this link, when combined with the loyalty commanded by the political party structure, allows the state to send an ideologically cohesive House delegation to Congress to influence federal policy.” Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 889 (2010).

6 135 S. Ct. 2652, 2671 (2015) [hereinafter *Arizona Legislature*].

7 *Id.* at 2666–68. The Court’s interpretation was based on three cases that had previously given the Elections Clause its “functional” gloss. *See also* Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916); Hawke v. Smith, 253 U.S. 221 (1920); Smiley v. Holm, 285 U.S. 355 (1932). However, as the dissenters pointed out, those cases never stood for the proposition that the *identity* of a legislature changes clause-by-clause in the Constitution. *Arizona Legislature*, 135 S. Ct. at 2682–83 (Roberts, C.J., dissenting).

8 *Arizona Legislature*, 135 S. Ct. at 2676. The initiative, known as Proposition 106, was introduced in response to decades of fruitless redistricting litigation. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1830–31 (2011) (providing a brief description of the controversies). Proposition 106 went on the ballot in the year 2000, and ultimately won by a margin of 56.1% to 43.9%. BETSEY BAYLESS, ARIZ. SEC’Y OF STATE, 2000 ANNUAL REPORT 44 (2000), http://repository.asu.edu/attachments/105092/content/2000%20annual_report.pdf. The vote broke along party lines, with groups like Common Cause, the League of Women Voters, and the Democratic Party as its major proponents. Cain, *supra* note 8, at 1831. Based on that reality, the Court’s characterization of Proposition 106 as a choice of the unified “people of Arizona” is strained at best.

removing legislatures from the line-drawing process curbs partisan entrenchment in state government.⁹ On that point, the Court noted that commissions like Arizona’s “have succeeded to a great degree in limiting the conflict of interest implicit in legislative control over redistricting.”¹⁰

The reasoning in *Arizona Legislature*, however, is problematic because it gainsays the Framers’ preference for a participatory (i.e., political) redistricting process. This preference was grounded on the fact that legislatures have long been considered adept at transforming disparate viewpoints into social consensus.¹¹ Thus, it makes sense that Article I, Section 4 was written to give those institutions—instead of unelected bodies—the weighty task of electoral design. But *Arizona Legislature* imperiled that choice by allowing states to bypass the Constitution in the name of “nonpartisan” redistricting.¹² Effectively, the Court *invited* states to vest redistricting power in commissions that are not accountable to the public, even though the costs to democracy are precipitous.¹³ In Arizona, for example, the state traded away a majoritarian consensus model for a system at risk of bureaucratic gridlock.¹⁴ This action hurt the citizens of Arizona the most, since they lost their ability to lobby *candidly and directly* for competing electoral maps, and they are now shut out by

9 *Arizona Legislature*, 135 S. Ct. at 2674 (reasoning that commission-driven redistricting, as adopted by Arizona, is “in full harmony with the Constitution’s conception of the people as the font of governmental power”). What the Court failed to see, however, was that the compromise of our federal Constitution changed that “font” of power in order to serve superordinating structural interests (e.g., federalism, pluralism). See Tolson, *supra* note 5, at 898. In other words, the Elections Clause was the Framers’ method of protecting the people from their own hyper-majoritarian vices.

10 *Arizona Legislature*, 135 S. Ct. at 2676.

11 James Madison famously observed that legislatures “refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations” Within that model, he argued, “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.” THE FEDERALIST NO. 10, at 76, 77 (James Madison). Over time, political scientists have confirmed the wisdom of Madison’s pluralist perspective. See, e.g., ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 223-56 (2d ed. 2005) (describing pluralism as an ordering theory of political science); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 22-66 (40th anniversary ed. 2009) (arguing that “interest group liberalism” captures the essence of modern legislative power).

12 *Arizona Legislature*, 135 S. Ct. at 2658 (framing the question before it as primarily “concern[ing] an endeavor by Arizona voters to address the problem of partisan gerrymandering”). The dissent amply criticized this rationale, asserting that: “The majority today shows greater concern about redistricting practices than about the meaning of the Constitution. I recognize the difficulties that arise from trying to fashion judicial relief for partisan gerrymandering. But our inability to find a manageable standard in that area is no excuse to abandon a standard of meaningful interpretation in this area. This Court has stressed repeatedly that a law’s virtues as a policy innovation cannot redeem its inconsistency with the Constitution. ‘Failure of political will does not justify unconstitutional remedies.’” *Id.* at 2690 (Roberts, C.J., dissenting) (internal citations omitted).

13 *Id.* at 2659.

14 See Cain, *supra* note 8, at 1833 (“[B]ecause redistricting is a technical exercise, [Arizona’s] commissioners necessarily rely upon staff with geographic information system (GIS) skills (i.e., the ability to actually draw the lines), those with statistics training to do the Voting Right Act section 2 analysis, and legal counsel specializing in voting rights law. This sets up principal-agent problems based on asymmetries of information. In theory, the technical staff could steer commission decisions in a given direction by skewing the advice and options it gives to the commissioners”).

procedural rules “shielding” the commission from outside influence.¹⁵ The result has been a staggering loss of public access to an important field of policymaking.

Concerned by that outcome, I aim to explore how public access to redistricting can be restored in states that use (or are planning to adopt) the commission model. In this Article, I argue that commission-driven redistricting (and the “apolitical” process enshrined therein) frustrates a citizen’s right to meaningfully participate in electoral design.¹⁶ This right is fundamental, and it has long been safeguarded by the First Amendment’s assertion that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”¹⁷ Accordingly, I propose that courts use the Petition Clause as a constitutional remedy against rules that abridge substantive public input in commission-driven redistricting.¹⁸ To illustrate this claim, I will analyze how one commonly adopted commission rule—the *ex parte* contacts prohibition—limits democratic choice.¹⁹ Then, I will examine how a court might deploy the First Amendment to repair the harm inflicted by the rule.

This Article proceeds in two substantive Parts. In Part II, I explore redistricting commissions from the institutional perspective. I first discuss the history of partisan gerrymandering and redistricting reform and then use that backdrop to analyze the comparative dynamics of independent commissions. Within that context, I survey and critique the *ex parte* contacts prohibition common to all independent commissions. My assessment reveals that—when compared to the legislative method—this rule limits public access to the redistricting process and

15 The inability to interact one-on-one with redistricting commissioners inflicts a serious individual harm on the people of Arizona. Absent procedural barriers, political “relationships . . . develop from extensive informal contacts between lobbyists and government decision-makers. Both parties to the exchange of information . . . benefit from this closeness. For their part, government decision-makers obtain valuable information that helps them make decisions. As for lobbyists, closeness allows them access to the people who make the decisions that affect them and their clients.” ANTHONY J. NOWNES, *INTEREST GROUPS IN AMERICAN POLITICS: PRESSURE AND POWER* 121 (2d ed. 2013).

16 My thesis focuses on a narrow issue: whether procedural barriers in the redistricting context abridge democratic-choice interests safeguarded by the First Amendment. But the same type of argument could be made about procedural barriers in *any other* area of public policy. This broader confluence of administrative law and First Amendment jurisprudence raises interesting questions, and merits more research than what is currently available. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 423–27 (2015).

17 U.S. CONST. amend. I. The Framers believed that, by securing this right, “the people may . . . publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will.” See Proceedings in the House of Representatives, June 8, 1789, in 1 ANNALS OF CONG. 738 (1789) (Joseph Gales ed., 1834), reprinted in RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* 110 (2012).

18 This argument relies on Professor Ronald Krotoszynski’s hypothesis that the Petition Clause carries an expansive right of access to the government. KROTOSZYNSKI, *supra* note 17, at 170. In his seminal work on the subject, Professor Krotoszynski posits that “petitioners have a right to have their petitions be received and heard by the government,” and that “this right to be heard must [also] include a right of proximity to the government officials to whom a petition is addressed.” KROTOSZYNSKI, *supra* note 17, at 170.

19 For an overview of the *ex parte* contacts rule in federal practice, see Sidney A. Shapiro, *Two Cheers for HBO: The Problem of the Nonpublic Record*, 54 ADMIN. L. REV. 853 (2002).

dilutes the effect of citizen petitions on electoral design. Using that conclusion as a descriptive frame, I then proceed to make my normative First Amendment argument.

In Part III, I explore how the harm inflicted by the *ex parte* contacts rule implicates the First Amendment. I do this by measuring the values historically protected by the Petition Clause against the rule's dilutive effect on those interests. Concluding that petitioning rights are materially infringed, I then contend that courts should subject the *ex parte* contacts rule to strict-scrutiny balancing. Borrowing from an analogous line of cases recognizing a right of access to court proceedings, I argue that this balancing reveals a constitutional infirmity. Therefore, I conclude that courts should invalidate the commission-specific rule as an invalid restraint on redistricting petitions.

I. REDISTRICTING COMMISSIONS & DEMOCRATIC CHOICE

Animating this Article is the acknowledgment that redistricting is, by nature, a political endeavor. This Part gives depth to that proposition by: (1) tracing a narrative between voting rights litigation and commission-driven redistricting and (2) exploring the institutional problems created by the commission model. The discussion proceeds in three sections. First, I examine the events that prompted commission-based reforms—namely, the failed attempt by courts to police partisan gerrymandering. Then, I survey how those reforms have played out in the states and consider why the independent commissions adopted in six jurisdictions are constitutionally significant. Finally, I delve into one of the procedural rules that makes commission-driven redistricting problematic, and I analyze why mechanisms of its kind violate principles of pluralism. This last section will provide a staging point for the First Amendment claim I make in Part III.

A. *Jilted at the Bench: A Brief History of Partisan Gerrymandering Claims*

History teaches us that commission-driven redistricting was born from a wrinkle in American jurisprudence. For over a century after the Constitutional Convention, courts respected the vesting of redistricting power in the legislative branch of each state.²⁰ Justice Frankfurter forcefully articulated this position, writing in *Colegrove v. Green* that “courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”²¹ That remedy, however,

20 For a historical overview of the voting rights debate prior to the 20th century, see Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U.L. REV. 1023, 1036-50 (2009); and Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEXAS L. REV. 1643, 1647-60 (1993).

21 328 U.S. 549, 556 (1946) (plurality opinion). In *Colegrove*, a group of voters sought to enjoin an Illinois congressional election. *Id.* at 550. The Illinois district map had not been modified since 1901, and the voters argued that it entrenched population inequalities. *Id.* at 551. The Court, however, rejected the plea for judicial intervention—reasoning that only the states and Congress could provide a remedy. *Id.* at 552-53.

became quite elusive in the mid-twentieth century, as racial entrenchment and major shifts in demography distorted the political process.²² It became clear by the 1960s that state legislatures were using their redistricting power for invidious ends, and in *Baker v. Carr*, the Supreme Court finally intervened.²³ The *Baker* Court held that challenges to electoral design were justiciable under the Fourteenth Amendment and concluded that courts had a duty to protect equality in voting rights.²⁴ Thus, despite Justice Frankfurter's criticism that the Court was spewing "empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope,"²⁵ the Court confidently entered the political thicket. Not surprisingly, that adventure soon presented the Court with insurmountable challenges.

In a line of cases beginning with *Reynolds v. Sims*, the Court elaborated its "one person, one vote" rule, which required states to draw districts with equal populations.²⁶ The Court later clarified that this equipopulation principle applied rigidly to congressional districts²⁷—even though a group of dissenters warned that "legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality."²⁸ In a scathing critique of the decision in *Wells v. Rockefeller*, Justice Harlan objected that "the Court's exclusive concentration upon arithmetic blinds it to the realities of the political process."²⁹ And similarly, in *Karcher v. Daggett*, Justice Powell noted that an "uncompromising emphasis on numerical equality" actually "encourages and legitimates even the most outrageous partisan gerrymanders."³⁰ These reproaches laid bare that the Court was lost in the political thicket: setting rules against quantitative vote dilution, while exacerbating

22 See Michael P. McDonald, *American Voter Turnout in Historical Perspective*, in THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR 125, 132–35 (discussing how low rates of voter turnout were a result of Jim Crow policies in the South).

23 369 U.S. 186, 201 (1962) (concluding that a 1901 Tennessee districting law violated equal protection). However, the writing was on the wall two years before *Baker* was decided. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court had ruled that an Alabama municipal gerrymander violated the Fifteenth Amendment.

24 *Baker*, 369 U.S. at 217. Writing for the Court, Justice Brennan established the familiar six-factor test for determining "political questions." *Id.* Upon applying those factors, he concluded that malapportionment claims could be addressed by the Court. *Id.* at 226.

25 *Id.* at 270 (Frankfurter, J., dissenting).

26 377 U.S. 533 (1964) (holding that a state must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"). In fact, the *Reynolds* rule was a derivative of two other cases decided that same Term. See *Gray v. Sanders*, 372 U.S. 368, 376–78 (1963) (invalidating Georgia's county-unit primary system, which used a vote-weighting mechanism similar to the federal electoral college); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that population disparities between Georgia's congressional districts violated Article I, Section 2 of the Constitution).

27 See *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (invalidating Missouri's congressional map); *Wells v. Rockefeller*, 394 U.S. 542, 546–47 (1969) (invalidating New York's congressional map).

28 *Wells*, 394 U.S. at 555 (White, J., dissenting).

29 *Id.* at 552 (Harlan, J., dissenting). His scathing dissent mocked the "magic formula" of "one man-one vote" as unworkable and ineffective at preventing partisan gerrymandering. *Id.* at 549–50.

30 462 U.S. 725, 785 (1983) (Powell, J., dissenting). Justice Powell's critique arose from the Court's decision to invalidate a New Jersey congressional plan that diluted Republican votes in Newark. *Id.* at 726.

problems in qualitative vote manipulation.³¹ However, because none of the Court's cases through the 1970s presented the precise issue for decision, the problem of partisan gerrymandering remained largely unpoliced.

This reality forced the Court in *Davis v. Bandemer* to consider whether equipopulous districts drawn with a partisan motive were unconstitutional.³² In a six-to-three decision, the *Bandemer* Court held that such partisan gerrymanders were in fact justiciable.³³ However, the majority disagreed on the standard to be applied—with Justice White proposing one test and Justice Powell offering the alternative.³⁴ Justice White's approach focused on two elements: the "consistent degradation" of voter influence and the "continued frustration" of the majority's electoral will.³⁵ Meanwhile, Justice Powell's approach hinged on three factors: the shapes of voting districts and adherence to established political boundaries; any legislative history bearing upon partisan motivation; and evidence of a dilutive distribution of voters by party affiliation.³⁶ Criticizing both tests as disingenuous, the dissent argued that partisan gerrymanders were simply nonjusticiable. Leading that view, Justice O'Connor predicted that courts would be unable to follow the tests set forth by the splintered majority.³⁷ She asserted that the judiciary was unfit to make policy determinations about partisanship, and accordingly, that it should stay out.³⁸

This lack of guidance from the Court made *Bandemer* claims impossible to prove, and decades of litigation failed to settle the matter.³⁹ Unsurprisingly, by the

31 See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 791–94 (2004) (describing in detail how the Court's voting-rights jurisprudence evolved from 1965 to 1985).

32 478 U.S. 109 (1986). In the earlier case of *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court had upheld a Connecticut redistricting plan against partisan gerrymandering claims. The *Gaffney* Court, however, failed to address the justiciability of the challenge. See *id.* at 737. Thus, in an important way, *Bandemer* was an attempt to correct the error.

33 *Id.* at 123. Justice White, writing for a majority on justiciability, explained that qualitative vote manipulation was not a political question. *Id.* at 126. He reasoned that the Baker factors counseled *in favor* of judicial intervention—especially since the Court had succeeded in finding a "judicially manageable standard" in the ambit of quantitative dilution claims (i.e., one person-one vote). *Id.* at 126–27.

34 The six-vote majority agreed that partisan gerrymandering required proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127. See also *id.* at 161 (Powell, J., concurring in part and dissenting in part). However, they divided on how to measure the requisite discriminatory effect. See Berman, *supra* note 30, at 796.

35 *Bandemer*, 478 U.S. at 132–33.

36 *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

37 *Id.* at 147 (O'Connor, J., concurring) (predicting that the proposed tests would devolve into "a requirement of roughly proportional representation for every cohesive political group").

38 *Id.* at 144 (O'Connor, J., concurring). This argument is buttressed by the fact that "nothing in our constitutional text or history supports the judgment that states act unconstitutionally by creating voting mechanisms and district lines that produce wholly disproportional representation." Berman, *supra* note 30, at 820.

39 See, e.g., *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 773–74 (4th Cir. 2003); *Smith v. Boyle*, 144 F.3d 1060, 1063–64 (7th Cir. 1998); *La Porte Cty. Republican Cent. Comm. v. Bd. of Comm'rs of Cty. of La Porte*, 43 F.3d 1126, 1128 (7th Cir. 1994); *Session v. Perry*, 298 F. Supp. 2d 451, 474–75 (E.D. Tex. 2004) (per curiam); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1280 (S.D. Fla. 2002); *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172–74 (W.D. Tex. 1993); *Pope v. Blue*, 809 F. Supp. 392, 395–97 (W.D.N.C. 1992), *summarily aff'd*, 506 U.S. 801 (1992); *Ill. Legislative Redistricting Comm'n v. LaPaille*, 782 F. Supp. 1272, 1275–76 (N.D. Ill. 1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 653 (N.D.

time *Vieth v. Jubelirer* was decided in 2004, a plurality of justices were convinced that partisan gerrymandering was a nonjusticiable political question.⁴⁰ Describing the proposed standards as “misguided when proposed,”⁴¹ and observing that they had produced “one long record of puzzlement and consternation,”⁴² the plurality voted to overrule *Bandemer* entirely.⁴³ The plurality also rejected the four tests proposed by the *Vieth* dissenters—echoing Justice O’Connor’s admonition that it is “impossible to assess the effects of partisan gerrymandering,” difficult to establish whether a party has majority status, and “impossible to assure” that a party that *does* enjoy majority status “wins a majority of seats.”⁴⁴ Justice Kennedy concurred in the judgment, agreeing that the *Bandemer* test was inappropriate and noting that the approaches of the *Vieth* dissenters were questionable.⁴⁵ However, he held out hope for a yet-to-be-discovered method.⁴⁶ As of 2016, the Court has not found that such a standard exists.

B. *Harnessing Politics to Fix Politics: The Rise of Commission-Driven Redistricting*

In large part because of *Vieth*, commentators soured to the idea that courts could (and should) police partisan gerrymandering.⁴⁷ Fueled by this frustration, policymakers began urging a more limited role for the judiciary in line-drawing controversies. The proposals for accomplishing this were varied, but importantly, all agreed that the political process should be “harnessed” to “fix” the conflict of interest

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- Ill. 1991); *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400, 403–05 (W.D. Va. 1991); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366–69 (Alaska 1987); *Legislative Redistricting Cases*, 629 A.2d 646, 664–65 (Md. 1993); *McClure v. Sec’y of Commonwealth*, 766 N.E. 2d 847, 856–57 (Mass. 2002).
- 40 541 U.S. 267, 290 (2004) (plurality opinion). In *Vieth*, Democratic voters challenged a Pennsylvania redistricting plan that strongly favored the Republican Party. *Id.* at 272–74. The controversy arose after the state lost two congressional seats to reapportionment, and was forced to redistrict. Berman, *supra* note 30, at 798. The plan was designed to hand Republicans fourteen of the state’s nineteen congressional seats—even though both parties enjoyed nearly equal support among the Pennsylvania electorate. *Id.* The legislature accomplished this by “slashing through municipalities and neighborhoods, splitting counties . . . [and] producing oddly misshapen districts.” Brief for Appellants at 12–13, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580).
- 41 *Vieth*, 541 U.S. at 283 (plurality opinion).
- 42 *Id.* at 282 (plurality opinion).
- 43 *Id.*
- 44 *Id.* at 287–89 (plurality opinion). For a detailed description of the four tests suggested by the *Vieth* dissenters, see Berman, *supra* note 30, at 799–802.
- 45 *Id.* at 306–17 (Kennedy, J., concurring in the judgment).
- 46 *Id.* at 308–12 (Kennedy, J., concurring). Instead, Justice Kennedy suggested that analyzing partisan gerrymanders through the First Amendment might yield a “more relevant” analysis. *Id.* at 314 (Kennedy, J., concurring) (“After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”).
- 47 See Cain, *supra* note 8, at 1810–11 (“Some legal scholars and political scientists continue to urge the courts to intervene more deeply into partisan and incumbent gerrymandering issues, putting forward new refinements of formal redistricting criteria or fairness formulas for consideration. But others think this unwise and seek to lessen the current burden on the courts.”).

in legislature-driven redistricting.⁴⁸ One commentator, for instance, proposed shaming politicians into drawing maps more “responsibly,”⁴⁹ while others argued for accountability through the state referendum process.⁵⁰ Most radically, however, a group of scholars suggested stripping elected officials of their redistricting duties entirely.⁵¹ It is in this milieu that commission-driven redistricting became an attractive policy mechanism.

Prompted by these proposals, states began establishing redistricting commissions with varying degrees of power.⁵² In a recent study of the existing models, Professor Bruce Cain describes commissions as being in one of four typologies: advisory, backup, political, or independent.⁵³ I will briefly sketch each model here in order of least to most autonomous.

First are advisory commissions, which can only *recommend* redistricting plans to the legislature and whose members are *not insulated* from partisan dynamics.⁵⁴ Eight states currently use the advisory commission model, and two of those jurisdictions serve as good illustrations of the categorical norm.⁵⁵ In New York, for example, the legislature can adopt, amend, or ignore the commission’s proposal as it chooses.⁵⁶ The commission itself consists of four legislators and two non-legislators who are appointed by party leaders in Albany.⁵⁷ This formation stands in contrast to the Iowa commission whose five members cannot be in party positions, in elected office, or be related to members of the state legislature.⁵⁸ On one hand, that quirk makes Iowa’s model more autonomous than New York’s; but the commission itself has little power. As in New York, the Iowa legislature may approve or reject the plans produced by the commission at will.⁵⁹

48 Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 86 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (providing an overview of trends in the scholarly literature).

49 Heather K. Gerken, *Getting from Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL’Y 1, 7 (2010).

50 Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668 (2006).

51 See, e.g., Gordon E. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970S 122, 149 (Nelson W. Polsby ed., 1971); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 380–84 (1968); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 68 (1995); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 849–50 (1997).

52 See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN’S GUIDE TO REDISTRICTING 20–22 (2010) (cataloguing the reform trends emerging throughout the United States).

53 Cain, *supra* note 8, at 1813.

54 *Id.* at 1813–15.

55 The eight states are Iowa, Maine, New York, Ohio, Rhode Island, Vermont, and Virginia. See Justin Levitt, *All About Redistricting: Professor Justin Levitt’s Guide to Drawing the Electoral Lines*, LOYOLA LAW SCHOOL, <http://redistricting.lls.edu/who.php> (last visited Dec. 10, 2015).

56 See N.Y. LEGIS. LAW § 83-m(5) (Consol. 2014 & Supp. 2016) (“The primary function of the task force is to compile and analyze data, conduct research for and make reports and recommendations to the legislature, legislative commissions and other legislative task forces.”).

57 See *id.* § 83-m(2) (describing the appointment process of the legislative task force members).

58 IOWA CODE § 42.5(2) (2014 & Supp. 2016).

59 See *id.* § 42.6(3) (explaining the duties of the commission).

Next are backup commissions, which can only exercise *conditional* (but independent) authority and whose members are not insulated from partisanship.⁶⁰ Eight states currently use backup commissions, albeit for different kinds of districts.⁶¹ However, in all of those jurisdictions, redistricting power is conferred only if a legislature fails to draw the lines.⁶² As Professor Cain notes, the mere existence of this trigger “can be consequential [because] knowing that stalemated redistricting negotiations would throw the matter to a backup commission can alter the legislative bargaining strategies in certain circumstances.”⁶³ This phenomenon can be readily observed in states like Connecticut whose commission has a mandated bipartisan composition.⁶⁴ When the partisan divide is close to fifty-fifty in the legislature, there may be more frequent recourse to the commission. But when the legislature is dominated by one party, the majority may wish to avoid a commission-enacted plan.

At a third level are political commissions, which possess *initial* line-drawing authority and are headed by panels that *proportionally represent* interests in the state.⁶⁵ Seven jurisdictions use this model with variations on composition and scope of power.⁶⁶ However, one feature common to all political commissions is their focus on balanced representation.⁶⁷ Some states achieve this by allocating membership through statewide offices (e.g., the Governor or Attorney General), while others mandate bipartisan and multi-geographic officeholders.⁶⁸ New Jersey’s institutional

60 Cain, *supra* note 8, at 1815.

61 Illinois, Maryland, Mississippi, Oklahoma, Oregon, and Texas use a backup commission only for state districts. See ILL. CONST. art. IV, § 3; MD. CONST. art. III, § 5; MISS. CONST. art. XIII, § 254; OKLA. CONST. art. V, § 11A; OR. CONST. art. IV, § 6; TEX. CONST. art. III, § 28 (explaining the composition or role of the backup commissions). Meanwhile, Indiana uses its backup only for congressional districts. *But see* IND. CODE ANN. § 3-3-2-2 (LexisNexis 2012) (explaining the establishment of redistricting commissions for congressional districts). The only state to use its backup for state and congressional districts is Connecticut. See *generally* CONN. CONST. art. III, § 6(b) (explaining the role of the backup commission).

62 See Cain, *supra* note 8, at 1815 (arguing that commissions’ initial lack of line-drawing power is “a serious deficiency”).

63 *Id.* To illustrate this point, Professor Cain presents a hypothetical situation: if a backup commission has a different partisan composition than the legislature, the risk of losing authority over the matter will always “give the majority party leadership more leverage over individual majority party members (i.e., ‘hold this up by insisting on your selfish demands and we lose control of the process to the other party’).” *Id.*

64 See CONN. CONST. art. III, § 6(b) (requiring that each party leader appoint two commissioners, and then agree on a ninth “citizen commissioner”).

65 See Cain, *supra* note 8, at 1816 (explaining that political commissions are more independent than advisory or backup commissions).

66 Arkansas, Colorado, Ohio, Pennsylvania and Missouri use political commissions for state redistricting. See ARK. CONST. art. VIII, § 1; COLO. CONST. art. V, § 48; MO. CONST. art. III, §§ 2, 7; OHIO CONST. art. XI, § I; PA. CONST. art. II, § 17(h). Meanwhile, the commissions in New Jersey and Hawaii draw both congressional and state lines. *But see* HAW. CONST. art. IV, § 2; N.J. CONST. art. II, § 2, ¶ 1.

67 Cf. Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002) (observing that “the entire New Jersey experience—from negotiating the district configurations, to deliberating within the Commission, to defending the new plan in court—highlights the significance of unity among” state factions and communities of interest).

68 Colorado’s model is noteworthy on this count. The state constitution requires that no more than four commissioners can live in the same congressional district. See COLO. CONST. art. V, § 48. *But see* Cain, *supra* note 8, at 1816 n.29 (other states only require bipartisanship.).

framework is an example of the latter approach. There, the redistricting commission “consists of equally sized contingents of Democratic and Republican appointees chaired by a tiebreaking member selected by the commissioners themselves or the by the state supreme court if the commissioners cannot agree.”⁶⁹ These commissioners must agree on New Jersey’s state and congressional districts, and they are supposed to do so in a manner that keeps elections competitive.⁷⁰ As it were, Professor Cain believes the New Jersey model should be emulated in other states.⁷¹

Finally, at the highest level of autonomy are independent commissions. As Professor Cain notes, independent commissions are the “culmination of a reform effort” aimed at completely eradicating the risks of partisan gerrymandering.⁷² He argues that these systems are in a league of their own because they: (1) are completely isolated from elected officials and (2) are able to put district lines in place without legislative approval.⁷³ Because of their novelty and because of the Supreme Court’s stamp of approval in *Arizona Legislature*,⁷⁴ independent commissions are likely to proliferate beyond the six states that currently use them (Alaska, Arizona, California, Idaho, Montana, and Washington).⁷⁵ Thus, studying the commissions that already exist can provide important insights about the landscape and future of redistricting reform.

In that endeavor, Professor Cain’s analysis again sheds some light on the nuances. For example, he observes that Washington’s approach is the *least* independent because it gives “party leaders the power to appoint commissioners subject to certain restrictions,” and it grants the legislature a “limited ability to amend the commission’s recommended districts.”⁷⁶ Meanwhile, he catalogues Alaska, Idaho, and Montana as *intermediate* states because they “do not give their legislatures any opportunity to amend the commission’s plans,” but they do “allow

69 Cain, *supra* note 8, at 1817.

70 *Id.* at 1838 (describing the “informal” bargaining process that occurs among New Jersey’s commissioners during redistricting).

71 *See id.* at 1839–41 (arguing that New Jersey’s bargaining process should become a formalized procedure in other commission frameworks).

72 *Id.* at 1817 (observing that the object of the independent commission model is to eliminate “legislators’ ability to choose the district lines they run in (sometimes simplistically characterized as elected officials choosing voters rather than voters choosing their representatives). The term for this problem—i.e., legislators drawing district lines that they ultimately have to run in—is legislative conflict of interest (LCOI”).

73 *Id.* These features sound similar to those which characterize political commissions. However, they are different in substance: the independent commission—at least in theory—operates entirely outside the sphere of horse-trading and tug-of-war prevalent in state capitals.

74 *See Arizona Legislature*, 135 S. Ct. at 2677 (“The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have ‘a [sic] habitual recollection of their dependence on the people.’ In so acting, Arizona voters sought to restore ‘the core principle of republican government,’ namely, ‘that the voters should choose their representatives, not the other way around.’” (citing *THE FEDERALIST* NO. 57, at 350 (James Madison)) and Berman, *supra* note 30, at 781)).

75 *See* ALASKA CONST. art. VI, § 8–10; ARIZ. CONST. art. IV, Pt. 2, § 1(14); CAL. CONST. art. 21, § 2; IDAHO CONST. art. 3, § 2(a); MONT. CONST. art. V, § 14; WASH. CONST. art. II, § 43(1).

76 Cain, *supra* note 8, at 1819; *see also* WASH. CONST. art. II, § 43(7); WASH. REV. CODE ANN. § 44.05.100 (2012).

legislative leaders to make . . . appointments subject to restrictions by elected officials, political party leaders, and lobbyists.”⁷⁷ Finally, he classifies Arizona and California as the *most* independent systems because their commissions are wholly autonomous, and their nomination processes are increasingly merit-based.⁷⁸ In Arizona, for example, the Commission on Appellate Court Appointments identifies potential candidates for office;⁷⁹ in California, legislative leaders can only strike nominees from the candidate pools prepared by the State Auditor.⁸⁰

In the aggregate, these reforms highlight a continued effort to eradicate legislative conflicts of interest from redistricting. However, that goal bears false promise. As Professor Cain aptly observes, “a core problem for U.S. redistricting reform is that the system of nonpartisan expertise is weaker (even, sadly, in electoral administration) than in the other Anglo-American democracies that also use single member district rules.”⁸¹ Thus, the idea that independent commissions can cure what *Vieth* could not is plainly unrealistic.

Indeed, not only is the goal illusory, its implementation presents a threat to the pluralist mode of policymaking.⁸² By erecting institutional barriers between the redistricting and legislative processes, citizens in commission-driven states are placed at two degrees of separation from electoral design. That separation, in turn, is deepened by the reality that most commissions have to abide by the administrative code of their home states.⁸³ This is because administrative codes are normally designed to mitigate outside pressures on rulemaking and adjudication.⁸⁴ In practice,

77 Cain, *supra* note 8, at 1819, and see ALASKA CONST. art. VI, § 8; MONT. CONST. art. V, § 14; IDAHO CODE § 72-1502 (2006).

78 Cain, *supra* note 8, at 1819.

79 See ARIZ. CONST. art. IV, pt. 2, § 1(3)–(8).

80 See CAL. CONST. art. XXI, § 2(d); CAL. GOV'T CODE § 8252(b)-(g) (West 2014); Cain, *supra* note 8, at 1824 (noting that the desired effect of this policy was to create “a bipartisan panel of citizens, unconnected to incumbent legislators and relying on neutral criteria, [who] would create fair and competitive district boundaries without explicit instructions to do so and without using political data”).

81 Cain, *supra* note 8, at 1820–21; see Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 780–86 (2013) (surveying non-American institutional models of election administration).

82 To understand this point, consider the *mechanics* of redistricting reform. In adopting a commission model, a state hopes to impact a dependent variable (partisan-motivated redistricting) by tweaking a group of independent variables (e.g., institutions, personnel). When it makes those changes, however, the state also impacts other output coefficients tied to the same variables—namely responsiveness to public needs. The result is a redistricting process that takes in neither downstream (i.e., legislator) nor upstream (i.e., citizen) inputs. This creates an information gap that ends up being filled by intra-stream (i.e., bureaucratic) priorities. Cf. Nikolaos Zahariadis, *Ambiguity and Multiple Streams*, in THEORIES OF THE POL'Y PROCESS 25, 31 (Paul A. Sabatier & Christopher M. Weible eds., 3d ed. 2014) (discussing how policy outputs are impacted by the confluence of input “streams”); Ellen M. Immergut, *Institutional Constraints on Policy*, in THE OXFORD HANDBOOK OF PUB. POL'Y 557, 565–68 (Michael Moran, Martin Rein & Robert E. Goodin eds., 2006) (discussing how governmental structure affects policy outputs).

83 See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 117 (2010) (noting that “election administration remains mostly a matter of state law and local practice,” and that “authority is largely devolved . . . to thousands of local election officials at the state and local level”).

84 See Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012) (“The job of public administration is not limited to aggregating the preferences of interest groups when normative issues present themselves. Instead, as Brian Cook points out, public administration must be a ‘political

this means citizens of some jurisdictions have no way to *directly* and *openly* share their views with the officials that matter.⁸⁵ It is precisely this mix of institutional and procedural isolation that raises grave concerns about the public's ability to meaningfully participate in redistricting.

C. *Procedural Dysfunction: Independent Commissions and the Ex Parte Contacts Rule*

To illustrate my point about the threat to pluralism from commission-based redistricting, it is useful to study how one procedural rule common to *all* independent commissions harms democratic choice. Take, for instance, the rule barring redistricting commissioners from engaging in *ex parte* contacts with citizens.⁸⁶

In California, the state legislature directs that “commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing.”⁸⁷ It further stipulates that “the commission shall establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program.”⁸⁸ Similarly, in Washington, the state legislature directs the commission to comply with the “Administrative Procedure Act, chapter 34.05 RCW.”⁸⁹ And that law, in relevant part, provides that commissioners “may not communicate, directly or indirectly, regarding any issue in the proceeding, with any person not employed by the agency who has a direct or indirect interest in the outcome of the proceeding, without notice and opportunity for all parties to participate.”⁹⁰

These commands are just examples, but they are representative of the *ex parte* contacts prohibition used by most states. Indeed, the rule is commonly adopted by

institution’ that ‘helps to create, to express, and to realize a nation’s public purposes.’”) (citing BRIAN J. COOK, BUREAUCRACY AND SELF-GOVERNMENT: RECONSIDERING THE ROLE OF PUBLIC ADMINISTRATION IN AMERICAN POLITICS 16 (1996)).

85 Of course, citizens may participate in other indirect or diminished ways (e.g., by attending public hearings held by the commission). But the mere absence of alternative avenues for *substantive* participation in redistricting is what creates an individual-rights problem.

86 Although state administrative codes differ in their implementation of the *ex parte* contacts rule, they largely follow the federal example. *Cf.* Ex Parte Communications in Informal Rulemaking Proceedings (Recommendation 77-3), 1 C.F.R. § 305.77 (2001) (listing the advantages of restraining *ex parte* communications, including reducing the possibility of unfair influence over decision makers, and affording interested parties opportunity to respond to information relied upon in the decision-making process).

87 CAL. GOV’T CODE § 8253(a)(3) (West 2014). The rule was passed as part of Proposition 11, which established the state’s independent redistricting commission by initiative. *See* Cain, *supra* note 8, at 1823.

88 CAL. GOV’T CODE § 8253(a)(7) (West 2014). This provision was meant to link the state’s *ex parte* contacts rule to California’s open-meeting laws. *See* Michael Halberstam, *Beyond Transparency: Rethinking Election Reform from an Open Government Perspective*, 38 SEATTLE U. L. REV. 1007, 1048–51 (2015).

89 WASH. REV. CODE ANN. § 44.05.080(1) (West 2014). This directive was enacted as part of a legislative package following the redistricting amendments to the state constitution. WASH. CONST. art. II, § 43(4) (“The legislature shall enact laws providing for the implementation of this section, to include . . . additional standards to govern the commission”).

90 WASH. REV. CODE ANN. § 34.05.455(2) (West 2014); *see also* William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 811–813 (1989).

redistricting commissions *because* it is key to accomplishing a “bias free” line-drawing process.⁹¹ On its face, this objective seems defensible; however, use of the rule also constricts the ability of citizens to interact candidly and personally with their commissioners. In effect, the prohibition creates a catch-22: a “neutral” redistricting process has been created but only at the expense of the constituent-representative relationship. Intuitively, that outcome seems more harmful to representative democracy than having a less-than-perfect method for drawing electoral maps.

To understand why, consider how constituents interact with officials in commission-based states. Because of the *ex parte* contacts rule, if an individual wishes to propose (or give feedback on) a redistricting plan, he may only do so in the sterile environment of a public hearing.⁹² As a practical matter, this requirement may force the citizen to dilute or modify his position out of fear of retaliation from other members of the public.⁹³ Alternatively, the requirement may cause commissioners to be less receptive to constituent input than if they were listening in a more informal—or even private—setting.⁹⁴ In either scenario, the citizen suffers from an inability to *impact* the redistricting process at an organic and substantive level. From that institutional perspective, the *ex parte* contacts rule discourages participation in a field that should be most open to the people it affects—that is, the voters.⁹⁵ Indeed, the

91 See Ron Levy, *Regulating Impartiality: Electoral-Boundary Politics in the Administrative Arena*, 53 MCGILL L.J. 1, 23–24 (2008) (observing that in a “recommendation designed to keep influential partisans from exercising power behind closed doors, Common Cause proposes the creation of new state readjustment commissions whose members would ‘be prohibited from all ex-parte communications’ with elected officials and lobbyists”).

92 I call the public hearing a “sterile environment” because it turns out to be useless for deliberative policymaking. At least one study in public administration has documented this conclusion: “The most ineffective technique is the public hearing. Public hearings do not work. Low attendance at public hearings is often construed as public apathy or silent approval of the status quo. In actuality, low attendance is more likely to be related to the structure of public hearings. Administrators recognize that the structure of public hearings and public meetings prohibits meaningful exchange. As one administrator said, ‘The public hearing is not about communicating, it is about convincing.’ . . . An activist suggested that the public hearing was window dressing, ‘We have these hearings so they can check off on their list that they’ve had their citizen participation. . . . It’s participation out of the fear that they are going to look bad.’” Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 323 (1998).

93 Cf. Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 845 (2010) (“Public participation has long been considered an essential element of effective governance, [and] resolution of broad social problems. . . . The values underlying First Amendment protections and pluralism demand that individuals and groups have the opportunity to make their voices heard, without the threat of retaliation by those equipped with greater financial or institutional power.”).

94 See King et al., *supra* note 89, at 319 (“Many administrators are, at best, ambivalent about public involvement or, at worst, they find it problematic As a result, although [they] view close relationships with citizens as both necessary and desirable, most of them do not actively seek public involvement. If they do seek it, they do not use public input in making administrative decisions.”).

95 At least one commentator has observed that partisan gerrymandering *actually serves* voter preference. See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 670–73 (2002) (arguing that legislature-driven redistricting safeguards popular incumbents and ensures better governance).

rule ensures that redistricting will be conducted in isolation and with primarily bureaucratic priorities in mind.⁹⁶

Compare that scenario to how an individual in a state with *legislative* redistricting participates in electoral design. Unlike the officials in commission-based states, legislators considering district maps are not bound by an *ex parte* contacts prohibition.⁹⁷ Therefore, they are able to meet individually and privately with constituents about their redistricting concerns and priorities. Because each legislator is answerable to the citizens with whom she meets, she is more likely to take these critiques seriously.⁹⁸ This practice, in turn, motivates legislators to advocate for their constituents and use their views as bargaining chips negotiating with each other.⁹⁹ Cognizant that their voice has weight in the legislative arena, individuals are more willing to share their unvarnished opinions about potential redistricting plans. At its core, this interaction is a positive outcome—since greater input in the process yields electoral maps that are more comprehensive and representative.

In a nutshell, the latter example represents pluralism at work. Contrary to the rationale in *Arizona Legislature*, this process was the one our Framers had in mind when they drafted Article I, Section 4 of the Constitution.¹⁰⁰ The fact that independent commissions with unworkable *ex parte* contact rules are countermanding that preference should be of deep constitutional concern. It is to that concern that I turn my attention next.

96 See *id.* at 678 (“With nonpartisan expertise . . . often comes detachment from the policy goals of the political branches. For example, it is quite typical for nonpartisan experts to attempt to make district lines as coterminous with political subdivision boundaries as possible. Pursuing such a goal, however, often conflicts with attention to communities of interest that straddle such boundaries and with a state’s public policy goal of regionalism in uniting cities and suburbs”).

97 In fact, the hallmark of the legislative process is that representatives can freely communicate with constituents. This information-sharing function is central for democratic accountability: if legislators fail to heed public demands, they will be met with retaliation at the ballot box. See STONE & BUTTICE, *Voters in Context: The Politics of Citizen Behavior*, in THE OXFORD HANDBOOK OF AMERICAN ELECTIONS AND POLITICAL BEHAVIOR, *supra* note 2, at 555, 561.

98 See Cain, *supra* note 8, at 1817 n.29 (“I can attest from my own experience as a redistricting consultant that legislators are often pressured by their constituents and supporters to shape district lines in particular ways and that legislators are often loath to ignore their demands for fear of the electoral or fundraising consequences”).

99 See Persily, *supra* note 92, at 679 (“Legislative bargains in the redistricting process are not completely detached from others that occur throughout a legislative session. Through redistricting, legislatures not only make the tough value-laden decisions as to how communities should be represented, but they create service relationships between representatives and constituents that fit into larger . . . policy programs”).

100 See *supra* note 5 and accompanying text.

II. RESTORING PUBLIC ACCESS TO REDISTRICTING

In Part II, I showed how the *ex parte* contacts rule undermines pluralism in redistricting policy. In Part III, I contend that this harm to democratic choice also triggers a redressable constitutional violation.¹⁰¹ Specifically, I argue that the *ex parte* contacts rule—when used by redistricting commissions—runs afoul of the First Amendment right “to petition the Government for a redress of grievances.”¹⁰² In making this claim, I contend that: (1) the Petition Clause safeguards a citizen’s right to influence electoral design and (2) that the *ex parte* contacts rule abridges that right by impeding and diluting meaningful participation in commission-driven redistricting.

This discussion proceeds in three sections. First, I define the scope of the Petition Clause coverage by examining its historical context. I then use that history to measure whether procedural barriers in redistricting trigger the Clause’s protection. Second, finding that the *ex parte* contacts rule materially inhibits First Amendment interests, I argue that courts should subject the provision to a strict scrutiny balancing test. Third, I forecast this balancing analysis by analogizing to a line of cases that enforce public access to court proceedings. Using that framework, I conclude that the *ex parte* contacts prohibition cannot survive strict scrutiny. On one hand, the rule inhibits a process that is historically *and* functionally reliant on democratic input; but on the other hand, a state’s interest in “neutral” redistricting is not compelling enough to justify the burden on citizen petitions.

A. *Constitutional Trigger: The Historically Recognized Right to Influence the Government*

As is customary in First Amendment jurisprudence, I begin with an inquiry into *what interests* are safeguarded by the Petition Clause.¹⁰³ Normally, this inquiry would be guided by the Supreme Court’s authoritative precedents. However, this is

101 This thesis relies on Professor Krotoszynski’s contention that the Petition Clause codifies a justiciable and enforceable right of access to the government. See KROTOSZYNSKI, *supra* note 16, at 170.

102 U.S. CONST. amend. I. It is no answer to impaired advocacy that a citizen can still petition a commission through the formal administrative process. See KROTOSZYNSKI, *supra* note 16, at 175 (“The availability of one means of petitioning the government should not imply the absence of other means of engaging in petitioning activity that would-be petitioners might prefer to use”). For one, participating in that process may not actually provide the type of access the citizen desires. See KEN GODWIN ET AL., LOBBYING AND POLICYMAKING: THE PUBLIC PURSUIT OF PRIVATE INTERESTS 40 (2013). Plus, the Supreme Court has warned against this precise argument. See *Healy v. James*, 408 U.S. 169, 183 (1972) (holding that “the Constitution’s protection is not limited to direct interference with fundamental rights,” and that procedural barriers can form “an impermissible, though indirect, infringement of . . . [those] rights”).

103 See generally Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1342–45 (2015) (describing the history and current state of the “trigger test” in First Amendment law).

impractical here, since the judiciary has long treated the Petition Clause as a dead letter.¹⁰⁴ Instead, I resort to the academic literature for more concrete guidance.

In his influential book on petitioning, Professor Ronald Krotoszynski suggests that “like the Free Speech Clause, the Petition Clause should be interpreted and applied dynamically or purposively—the federal courts should identify the core purpose, or purposes, of the Petition Clause and then use the clause to advance and secure them.”¹⁰⁵ To that end, considering the Clause’s “historical origins and past meaning should be useful, perhaps even essential, to identifying and securing its proper place in contemporary constitutional law.”¹⁰⁶ Following that instruction, I aim now to define the Petition Clause through its historical antecedents.¹⁰⁷

Petitioning first became a significant political activity in the thirteenth century when it was codified in the Magna Carta as a right of the nobility enforceable against King John.¹⁰⁸ By the reign of Edward III in the mid-1300s, petitioning was a common practice exercised by noblemen and knights.¹⁰⁹ The Crown had a formalized structure for receiving petitions, and this structure consisted of in-person presentations by the landed elite on behalf of the English people.¹¹⁰ This model was followed by Parliament in the sixteenth century as its representative power grew.¹¹¹ The House of Commons would receive grievances from the citizenry, and accordingly, the House petitioned the Crown for changes in the general law.¹¹² As Parliament itself became the source of prescriptive power, citizen petitions were read and debated directly.¹¹³ And by the time of the English Revolution in 1688, petitioning was seen as a birthright of all

104 As I describe in Part III.B, the Supreme Court has invoked the Petition Clause before. However, those precedents have been limited to the circumstances they control, and have failed to recognize the Clause’s independent force. See KROTOSZYNSKI, *supra* note 16, at 157.

105 *Id.* at 81.

106 *Id.* at 82.

107 Much of the historical analysis in this section draws from my previous research on the Petition Clause. See generally Mateo Forero, *Distorting Access to Government: How Lobbying Disclosure Laws Breach a Core Value of the Petition Clause*, 67 ALA. L. REV. 327, 342–46 (2015).

108 See Magna Carta 1215, 16 John c. 61, reprinted in 5 THE FOUNDERS’ CONSTITUTION 187, 187 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[I]f we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one . . . let [the] barons come to us . . . and let them ask that we cause that transgression to be corrected without delay.”).

109 KROTOSZYNSKI, *supra* note 16, at 85 (citing Professor William Stubbs’ extensive research on the practices and traditions of the English Crown in the high medieval period).

110 *Id.* at 85–86 (“Parliament itself generally petitioned the Crown to establish a [new] law; it did not purport to make laws in its own name. Only later, and not until after Charles I gave his consent to the Petition of Right in 1628, did Parliament consistently enact bills on its own authority . . .” (footnote omitted)).

111 *Id.* at 86.

112 See *id.* at 86–87 (citing WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 346–48 (2d ed. 1892)) (documenting the work of the Committee of Grievances, which considered the vast array of petitions submitted to the House of Commons during the reigns of James I and Charles I).

113 See ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 516–17 (1930) (discussing a 1669 enactment which made consideration of petitions an inherent governmental duty of the House of Commons).

citizens.¹¹⁴ It was enshrined in the English Bill of Rights and was frequently used as a method of redress for both private grievances and collective concerns.¹¹⁵

The idea that petitioning was a core democratic function was later exported to the American colonies, where it developed in unprecedented ways. Because North American settlements in the late seventeenth century were territorially disperse, direct petitioning by citizens became the most convenient method for legislators to keep a pulse on social needs.¹¹⁶ In many instances, individuals lobbied for regulations on local trades and professions, and community representatives stridently sought legislation on the sale of alcohol and lottery tickets.¹¹⁷ Colonial legislatures also considered petitions made by disenfranchised groups,¹¹⁸ and legislatures even accepted requests by lobbyists that advanced purely private interests.¹¹⁹ History tells us that the governor of New York was one of the first colonial officials to be subjected to this kind of organized petitioning by English merchants.¹²⁰ But that example was not an isolated or anomalous political occurrence; in a concrete way, it shows that petitioning was alive across the American colonies.

Virginia, in particular, had a well-established petitioning culture, where powerful landed interests played the game of pressure politics.¹²¹ As early as the 1710s, well-connected planters from the Chesapeake Bay lobbied Virginia authorities for “legislation . . . prohibiting the export of bulk tobacco from that colony, for regulation of the trade to prevent Scottish smuggling, for a long period of grace between the landing of tobacco and the paying of customs duties, and for the prevention of tobacco planting in England.”¹²² These lobbying tactics were also common in Pennsylvania, where religious groups wielded great influence. At the turn of the eighteenth century, Quaker lobbyists “worked for approval of a Pennsylvania act forbidding the importation of slaves, they supported the proprietorship as a form of government, they worked to keep the Three Lower Counties (now Delaware) part of Pennsylvania, [and] they backed the separation of New York and New Jersey . . .

114 See KROTOSZYNSKI, *supra* note 16, at 87 (“This growth in the importance and frequency of petitioning corresponds to the clearer demarcation of Parliament’s legislative power.”).

115 *Id.* at 86–87.

116 See RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 6 (1979) (underscoring that petitioning had been transplanted “literally during the first year of settlement at Jamestown, and by 1700 [it] had assumed an important role in the political process”).

117 See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 209–10 (1943).

118 In 1769, a group of freed, black men lobbied the Virginia legislature to exempt their wives from a poll tax. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2185 (1998) (noting that this campaign “was as incendiary an action as could be conceived in the slave South. All the more stunning, then, that the petition was not simply heard, but granted”).

119 See *id.* at 2183 (studying the lobbying campaigns of two women in colonial Georgia on behalf of their families).

120 See John D. Runcie, *The Problem of Anglo-American Politics in Bellomont’s New York*, 26 WM. & MARY Q. 191, 203 (1969) (highlighting the mercantile lobby’s influence on trade policy in colonial New York).

121 See Alison G. Olson, *The Virginia Merchants of London: A Study in Eighteenth-Century Interest-Group Politics*, 40 WM. & MARY Q. 363, 368–70 (1989).

122 *Id.* at 369.

.¹²³ The Quaker lobby was also active in New England, where it pressured the Massachusetts, New Hampshire, and Connecticut assemblies for a variety of impost exemptions.¹²⁴ These provisions were extended in 1737, after the governor of Massachusetts was “waited upon” by Quaker lobbyists from London.¹²⁵

These examples demonstrate that factional pressures were an accepted political reality in America by the 1770s. In fact, dissenters to the English Crown used those exact tactics to spark the cause of independence.¹²⁶ American revolutionaries drew from the tradition of petitioning to craft their own political message.¹²⁷ Their “Olive Branch” Petition of 1775 was essentially a lobbying effort on behalf of American interests to secure political outcomes in Britain (namely that the colonies be given free trade incentives by repealing laws like the Stamp Act).¹²⁸ When these exhortations fell on deaf ears, the colonists found just cause for self-determination: their *right to be heard* by the sovereign was nothing more than a formality.¹²⁹ It was a rude awakening for those American colonists who believed they still had access to the British ruling class, and the frustration of that belief made petitioning an item of constitutional reform.¹³⁰

Soon after independence, nine of the thirteen states adopted constitutions with sweeping protections for petitioning.¹³¹ For example, the Vermont Constitution of 1777 gave its citizens “a right . . . to apply to the legislature for redress of grievances, by address, petition or remonstrance.”¹³² However, proposals for a more expansive federal right led to heated debate at the Constitutional Convention.¹³³ Some delegates pushed for a right of the people to bind their representatives by “instruction,” but luminaries like James Madison disagreed.¹³⁴ Madison believed that a right conferring

123 Alison G. Olson, *The Lobbying of London Quakers for Pennsylvania Friends*, 117 PA. MAG. HIST. & BIOGRAPHY 131, 135 (1993).

124 Kenneth L. Carroll, *American Quakers and Their London Lobby*, 70 QUAKER HIST. 22, 36 (1981).

125 *Id.* at 38.

126 See Don L. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretation*, at 57–66 (Aug. 1971) (unpublished Ph.D. dissertation, Texas Tech University) (on file with author) (cataloguing the petitions filed with Parliament seeking redress of colonial wrongs inflicted by George III).

127 See Alice Tanner Boyer, *The “Olive Branch” Petition*, 22 U. KAN. CITY L. REV. 183, 185 (1953–1954) (describing the heated debates over independence that led to a last-ditch plea to the King for peaceable redress).

128 See John Dickson & Thomas Jefferson, *The Olive Branch Petition*, reprinted in Boyer, *supra* note 123, at 189 (requesting that “measures be taken for preventing the further destruction of the lives of your Majesty’s subjects; and that such Statutes as more immediately distress any of your Majesty’s colonies be repealed . . .”).

129 Richard Penn ultimately delivered the Olive Branch Petition to the court of George III. See Boyer, *supra* note 123, at 186. It is unclear if the King personally reviewed the petition, but whether by happenstance or deliberate inattention, the document was left unanswered. *Id.*

130 KROTOSZYNSKI, *supra* note 16, at 108 (“To the colonists, the right to petition for redress of grievances (and the concomitant right to have one’s petition heard) was so fundamental that denial of the right was an act of tyranny and grounds for revolution.”).

131 Mark, *supra* note 114, at 2199–203.

132 VT. CONST. ch. 1, art. XVIII (1777).

133 KROTOSZYNSKI, *supra* note 16, at 109.

134 *Id.* at 110.

only *access* to officials was consistent with the Anglo-American practice.¹³⁵ Later, in *Federalist No. 10*, Madison noted that special interests “are sown in the nature of man,” and observed that democracy “involves the spirit of party and faction in the necessary and ordinary operations of the government.”¹³⁶

Records from the First Congress show that Madison’s predictions were correct: petitioning had become an effective method for obtaining policy outcomes in the nascent republic.¹³⁷ Within months of opening its doors, Congress received petitions from veterans, tradesmen, printers, and surveyors.¹³⁸ Notable examples included a group of Boston blacksmiths seeking wartime backpay, as well as Philadelphia newspapermen demanding patent legislation.¹³⁹ These and many other petitioners used blunt in-person tactics to lobby (e.g., by seeking out legislators in their daily activities to secure political promises).¹⁴⁰ A good example of this approach was the antislavery campaign mounted by a well-funded and highly organized group of Quakers.¹⁴¹ In a show of force, members of the New York Yearly Meeting “wrote supplemental briefs for the committee considering [antislavery petitions], accosted members outside the doors of Congress, visited them at their lodgings, and invited them for meals, all the while making themselves conspicuous in the House galleries, looming over the proceedings like the specters of a guilty national conscience.”¹⁴²

The Quaker effort was so successful in stirring up debate that many representatives became suspicious of the initiative.¹⁴³ The report of the ad hoc committee on abolition voiced this concern, noting sourly that “every principle of policy and concern for the dignity of the House, and the peace and tranquility of the United States, concur to show the propriety of dropping the subject, and letting it sleep where it is.”¹⁴⁴ However, with its back against the wall, the committee suggested: (1) taxing the importation of slaves, (2) issuing guidelines for humane

135 Madison was able to convince his colleagues to drop the more expansive proposal. *Id.* (citing congressional records which indicate that the proposals for a right of instruction “fell by the wayside”).

136 THE FEDERALIST NO. 10, at 78–79 (James Madison) (Clinton Rossiter ed., 1961).

137 For example, the first petition to arrive in the House of Representatives was a plea from the Baltimore business community seeking enactment of trade policies. See William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT 29 (Kenneth R. Bowling & Donald R. Kennon eds., 2012).

138 Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT, *supra* note 127, at 62. This account of the initial flood of lobbying is particularly revealing, and is worth a close read for the history student.

139 *Id.*

140 *Id.* at 63–64 (“One suspects a good deal of loitering around taverns was involved, because in some cases . . . there is little evidence of extensive or meaningful contact with members of Congress.”).

141 See William C. diGiacomantonio, *For the Gratification of a Volunteering Society: Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169–97 (1995).

142 Pasley, *supra* note 134, at 65.

143 *Id.* at 66 (noting that the Quaker campaign was “unique in its openness, high degree of organization, and goal of effecting broad changes in government policy . . .”).

144 1 ANNALS OF CONG. 1472 (1790) (Joseph Gales ed., 1834), *reprinted in* KROTOSZYNSKI, *supra* note 16, at 111–12 (footnote omitted) (internal quotation marks omitted).

treatment, and (3) banning the fitting of slave-trade vessels in American ports.¹⁴⁵ Although these policy recommendations were a far cry from banning slavery, they were still a victory for the Quaker lobbyists and their New York constituents. What is even more telling about this episode, however, is the fact that the committee's complaints never engendered a backlash. As history indicates, this is because people of the day understood that *direct* and *proximate* petitioning was a fundamental right.

B. *Measuring the Harm: Procedural Barriers to Petitioning and the Analytical Quandary*

These historical accounts are rich in and of themselves. But what do they tell us about the interests protected by the Petition Clause? And more to the point of this Article, how do procedural barriers in commission-driven redistricting intrude on those values? In his book, Professor Krotoszynski provides a sound answer to the first question:

The history of the Petition Clause, including the history of its colonial and English antecedents, strongly suggests that the right to petition the government for a redress of grievances contemplates a right to do so *in close proximity* to the government officials to whom the petition is addressed. In other words, the Petition Clause of the First Amendment properly construed and applied, should guarantee would-be petitioners a right, exclusive of their speech and assembly freedoms, to seek redress of their grievances *within both sight and hearing* of those capable of giving redress.¹⁴⁶

Seizing on that observation, Professor Krotoszynski suggests that “courts should start from a presumption that favors the ability of ordinary citizens to engage their elected representatives, government officers, and party leaders.”¹⁴⁷ Therefore, he argues, any “regulations that would remove [petitioners] from the sight or hearing of government officials” should be deemed “invalid absent a substantial justification supported by the record.”¹⁴⁸

Using that framework to address the “pluralism problem” sketched in Part II.C, I now posit that procedural restraints in commission-driven redistricting presumptively breach the protective sphere of the Petition Clause. The argument is based on the reality that the *ex parte* contacts rule, by design, prevents citizens from getting within earshot of their redistricting officers.¹⁴⁹ In states with independent commissions, this prohibition presents an acute problem because individuals have *no alternative avenues* (short of filing a lawsuit) for directly participating in electoral

145 KROTOSZYNSKI, *supra* note 16, at 112 (cataloguing the various policy proposals referred to the floor of the House of Representatives). Professor Krotoszynski characterizes this outcome as a political success, noting that “despite the vehement objections of Southern members of the House, the members considered, debated, and responded on the merits to the petitions seeking abolition of the slave trade.” *Id.*

146 *Id.* at 154–155 (emphasis added).

147 *Id.* at 168 (observing that this presumption best serves the concept of self-government highlighted in ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–26 (1948)).

148 KROTOSZYNSKI, *supra* note 16, at 156.

149 See *supra* notes 81–83 and accompanying text.

design.¹⁵⁰ In those systems, therefore, constituents can only interact with the mapmakers in the most formal and rehearsed of circumstances—a fact which sterilizes public input and prevents consensus building.¹⁵¹ As a conceptual matter, that outcome falls short of the advocacy-in-close-proximity value enshrined in the Petition Clause.¹⁵² And, since the *ex parte* contacts rule preserves that specific status quo, there is little doubt that the First Amendment is implicated.

The remaining question, then, is how a court might apply Professor Krotoszynski's presumption by way of existing doctrine. Regrettably, because the Supreme Court has relegated the Petition Clause to second-class status, there is no direct answer to that question.¹⁵³ Even a cursory examination of the cases that have addressed petitioning reveals their limited utility here.

The Court first discussed the Petition Clause in 1867, almost a century after it was ratified as part of the Bill of Rights.¹⁵⁴ At first, there were indications that the Clause might be given independent constitutional effect,¹⁵⁵ but those aspirations were quickly extinguished. Instead, the Court began insisting that the right of petition could only be invoked if it was exercised in combination with other expressive freedoms.¹⁵⁶ That approach led to the unfortunate fiction that deprivations of access to government could (and should) be decided on other First Amendment grounds.¹⁵⁷ Worse yet, this inattention to the Petition Clause's history and purpose led the Court

150 Sadly, this is not a hypothetical observation. Just one Term after the *Arizona Legislature* case was litigated, the Arizona redistricting commission returned to the Supreme Court to defend its plans against partisan gerrymandering claims. See Amy Howe, *Argument Analysis: Justices Hard to Read on Arizona Redistricting Plan*, SCOTUSBLOG (Dec. 8, 2015, 5:41 PM), <http://www.scotusblog.com/2015/12/argument-analysis-justices-hard-to-read-on-arizona-redistricting-plan/>. As of this writing, the Court has not yet ruled on the appeal from the district court. See *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014). The Supreme Court ruled on the appeal from the district court on April 20, 2016. See *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016).

151 See *supra* note 89 and accompanying text.

152 Cf. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 624 (1999) ("The right to petition guarantees the right to speak to a particular body of persons, those comprising the government. This targeted speech serves values not achieved by general speech. It gives citizens *a better chance at having their voices heard* by the very public servants who are making the decisions in government. People do not have to wait or hope that their views will be channeled by the press or others to the government" (emphasis added)).

153 KROTOSZYNSKI, *supra* note 16, at 156 ("The Supreme Court has, for almost all intents and purposes, simply subsumed and merged the Petition Clause into the rights of speech, assembly, and association").

154 *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867) (noting that a citizen "has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions").

155 See *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances").

156 *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and petition for redress of grievances. All these, though not identical, are *inseparable*" (emphasis added)).

157 See *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the *same constitutional analysis*" (emphasis added)).

to render a grossly misinformed decision that struck a reeling blow to the right.¹⁵⁸ Since then, litigants have seldom dared to invoke the Petition Clause in its independent capacity.¹⁵⁹ In fact, the only time they have successfully done so was in the antitrust context. However, for purposes of my analysis, even these precedents provide scant guidance.

Arising from two Supreme Court cases, the *Noerr-Pennington* doctrine relies on the Petition Clause to grant absolute immunity from antitrust liability for lobbying activities that have anticompetitive effects.¹⁶⁰ Particularly in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court seemed to grasp the urgency of letting constituents petition without fear of retaliation.¹⁶¹ In his majority opinion, Justice Black noted that democracy “depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would” create serious institutional problems.¹⁶² Relying on that principle, the Court concluded that it was permissible for a railroad company to wage a mass media campaign aimed at passing legislation harmful to its competitors.¹⁶³

That disposition, of course, is in line with our historical understanding of Petition Clause protections.¹⁶⁴ However, the *Noerr-Pennington* doctrine provides little in the way of a doctrinal rubric for analyzing procedural barriers to the right of petition. It also does not help that *Noerr* dealt with *indirect* petitioning—which is

158 In *McDonald v. Smith*, the Court held that the Petition Clause did not afford citizens immunity from libel suits for statements made in petitions. 472 U.S. 479, 484 (1985). It reasoned that the right of petition is “cut from the same cloth as the other [First Amendment] guarantees.” *Id.* at 482. Thus, “there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.” *Id.* at 485. *But see* KROTOSZYNSKI, *supra* note 16, at 158 (“What the [*McDonald*] Court failed to recognize was that through its history, the Petition Clause virtually demands special First Amendment status”); Eric Schnapper, “*Libelous*” *Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 343–45 (1989) (demonstrating that petitioning had always enjoyed broad immunity from suit, and that it was conceptually distinct from freedom of speech).

159 Even in cases where petitioning rights are *squarely* abridged by lobbying regulation, litigants have opted against a pure Petition Clause theory. *See* Nat’l Ass’n of Mfrs. v. Taylor, 582 F.3d 1, 9 (D.C. Cir. 2009) (quoting the petitioner’s brief for the position that “the disclosures mandated . . . will discourage and deter speech, petitioning, and expressive association”); Brief for Plaintiff-Appellant at 26, Nat’l Ass’n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009) (No. 08-5085); Forero, *supra* note 103, at 338–39.

160 *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In recent years, litigants have sought to extend the holdings in these cases beyond the antitrust context. *See* GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 8 (1996) (cataloguing different kinds of retaliation lawsuits that violate the right of petition).

161 365 U.S. at 138 (“The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms”).

162 *Id.* at 137–38.

163 *Id.* at 145 (“In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other . . . [T]hat [deceptive effort], reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned”).

164 *See supra* notes 115, 117, 133 and accompanying text.

materially different from the type of proximate participation abridged by the *ex parte* contacts rule.¹⁶⁵ Therefore, in order to extract a meaningful legal test for Petition Clause analysis, it is necessary to look elsewhere in the First Amendment for inspiration. This approach might seem academic, but it has actually been endorsed by the Supreme Court. In *Borough of Duryea v. Guarnieri* the Court noted that:

[T]he rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are ‘cognate rights’ Both speech and petition are integral to the democratic process, *although not necessarily in the same way*. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy . . .

. . .¹⁶⁶

Accordingly, since the Speech and Petition Clauses are at least analogues, it seems prudent to use that branch of doctrine to inform the present constitutional analysis. As it turns out, one line of the Speech Clause cases furnishes an appropriate methodology for safeguarding a right of “proximate petitioning.”

C. *Applying the Test: Protecting Redistricting Petitions Through the Public Access Principle*

In a series of decisions between 1980 and 1986, the Supreme Court announced that the First Amendment—through the Speech and Press Clauses—implies a right of public access to court proceedings.¹⁶⁷ Relevant to this Article, those cases articulated a test that defines *when* a barrier to governmental access becomes constitutionally impermissible.

The foundation for this “public access” test was laid out in *Richmond Newspapers, Inc. v. Virginia*, where the Court declared for the first time that citizens possess an enforceable right to observe criminal trials.¹⁶⁸ In a plurality opinion

165 KROTOSZYNSKI, *supra* note 16, at 161 (“Justice Black’s opinion does not link a mass media campaign—or other forms of indirect petitioning—to the traditional exercise of the right, which involved direct communication between a group of petitioners, on the one hand, and a legislator or an executive branch official, on the other. It is certainly true that this sort of indirect petitioning seems rather far removed from the historical paradigm of petitioning, which involved, quite literally, laying a petition at the foot of the throne”).

166 No. 09-1476, slip. op. at 7 (U.S. June 20, 2011) (internal citations omitted) (emphasis added). In *Guarnieri*, the Court considered whether the Petition Clause protects public employees from retaliation by their supervisors for grievances lodged against them. *Id.* at 1. Ultimately, the Court held that §1983 suits of this kind should be judged under the Speech Clause’s “public concern” test. *Id.* at 5. To reach that conclusion, the Court reaffirmed *McDonald v. Smith*’s flawed logic of commingled expressive rights. *Id.* at 8; see *supra* note 154 and accompanying text. However, as the passage I quoted above suggests, the Court did leave space for analogizing from Speech Clause precedent to create *new doctrine* specific to the Petition Clause.

167 For an in-depth overview of these cases and their antecedents, see Edward J. Klaris, David A. Schulz et al., “If it Walks, Talks and Squawks . . .” *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L.J. 21 (2005).

168 448 U.S. 555, 579–80 (1980).

authored by Chief Justice Burger, the Court traced the history of criminal trials from the Norman Conquest of England to Colonial America.¹⁶⁹ Using that backdrop, the Court found that “throughout its evolution, the trial has been open to all who cared to observe.”¹⁷⁰ Therefore, the presumption of openness “is no quirk of history; rather, it has long been recognized as an indispensable attribute” of due process.¹⁷¹ In a concurring opinion, Justice Brennan went beyond the historical record to underscore the “structural role” that the First Amendment plays “in securing . . . our republican system of self-government.”¹⁷² On this point, he noted that a First Amendment right of access supports “not only ‘the principle that debate on public issues should be uninhibited, robust and wide-open,’ but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”¹⁷³

Two years later, in *Globe Newspaper Co. v. Superior Court*, the Court reaffirmed its commitment to the *Richmond Newspapers* holding.¹⁷⁴ Led by Justice Brennan, the Court held that a statute requiring closed proceedings during the testimony of rape victims breached the First Amendment.¹⁷⁵ In so concluding, the Court endorsed the theory that public access promotes the “free discussion of governmental affairs.”¹⁷⁶ It reasoned that any abridgment of that interest should be subjected to strict scrutiny. In other words, the government must prove that mandatory closure of a proceeding “is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”¹⁷⁷ Applying the standard, the Court found that the interest in shielding rape victims from press scrutiny—though strong—“does not justify a mandatory closure rule.”¹⁷⁸ Nonetheless, the Court noted, “the circumstances of the particular case may affect the significance of the [openness] interest.”¹⁷⁹

Finally, in *Press-Enterprise Co. v. Superior Court*, the Court extended strict scrutiny protection *outside* the criminal context.¹⁸⁰ In the first phase of litigation, the

169 *Id.* at 564–69 (citing MATHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343–45 (6th ed. 1820) and 3 WILLIAM BLACKSTONE, COMMENTARIES *372–73).

170 *Id.* at 564.

171 *Id.* at 569. On that point, the Court also noted that “without the freedom to attend [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.” *Id.* at 580 (internal quotations omitted).

172 *Id.* at 587 (Brennan, J., concurring).

173 *Id.* at 587 (Brennan, J., concurring). In the same breath, Justice Brennan also cautioned that this rationale could produce “theoretically endless” justification for governmental access. *Id.* at 588. To mitigate this problem, he suggested that an assertion of the right must be weighed against its effect on the integrity of the proceeding. *Id.* at 589.

174 457 U.S. 596, 604 (1982).

175 *Id.* at 610–11.

176 *Id.* at 604–05.

177 *Id.* at 606–07.

178 *Id.* at 607–08.

179 *Id.* The Court recalled that a “flexible” application of the compelling-interest rubric was justified—especially since “the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are always required before the right of access may be denied.” *Id.* at 608 n.20.

180 The case was actually litigated on two different occasions in front of the Supreme Court. *See Press-Enterprise Co. v. Super. Ct. of Cal. for the County of Riverside*, 464 U.S. 501 (1984) [hereinafter *Press-*

Court held that its *Richmond Newspapers* holding applied to jury *voir dire*.¹⁸¹ And in the second phase, it held that the First Amendment also attached to preliminary hearings—even though they had no particularly strong analogue in history.¹⁸² To explain this decision, the Court read its cases as creating one single frame of analysis. Specifically, it prescribed that a court may extend the right of public access whenever “tradition” or “structural benefits” call for it.¹⁸³ Thus, because openness in preliminary hearings was “structurally beneficial,” a lack of historical antecedents could not save the closure rule.¹⁸⁴

By combining the *Richmond Newspapers* and *Globe Newspaper* holdings in this manner, the *Press-Enterprise* Court created a convenient test for the lower courts to apply.¹⁸⁵ Following that test, a court considering when to keep a proceeding closed must examine: (1) whether public access to the proceeding has been traditionally granted and (2) whether “public access plays a significant positive role in the functioning of the particular process in question.”¹⁸⁶ If both questions are answered in the affirmative, or if one answer carries a strong affirmative presumption, the court may not close the proceeding. Only a compelling interest could justify the closure—and even then, the government must show that the barrier it has erected is narrowly tailored to meet it.¹⁸⁷

For purposes of the present Petition Clause analysis, the *Press-Enterprise* test seems useful. Conveniently, it answers the question of *when* a procedural restraint cannot block citizens from engaging (through observation or participation) in democratic functions. Indeed, applying the *Press-Enterprise* analysis to the *ex parte*

Enterprise II; *Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

181 *Press-Enterprise I*, 464 U.S. at 507–09, and see Klaris, Schultz et al., *supra* note 163, at 34 (“Writing for the unanimous Court, Chief Justice Burger analyzed the structural benefits of open *voir dire* proceedings, reinforcing past findings that public proceedings enhance the basic fairness of the process, create an appearance of fairness that is essential to public confidence, and offer cathartic value”).

182 *Press-Enterprise II*, 478 U.S. at 10–11 (“Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public. Long ago in the celebrated trial of Aaron Burr for treason, for example, with Chief Justice Marshall sitting as trial judge, the probable-cause hearing was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens” (citing *United States v. Burr*, 25 F. Cas. 1 (C.C.D. Ky. 1806))).

183 *Id.* at 9 (“Considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding . . . passes these tests of experience and logic, a qualified First Amendment right of public access attaches”).

184 *Id.* at 15.

185 Indeed, the test is so versatile that it has been applied to a vast array of contexts including civil and bankruptcy proceedings. See, e.g., *Rushford v. New Yorker Mag.*, 846 F.2d 249, 253 (4th Cir. 1988); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983); *In re Symington*, 209 B.R. 678, 692–94 (Bankr. D. Md. 1997); *In re Vance*, 176 B.R. 772, 778 (Bankr. W.D. Va. 1995); *In re Astri Inv. Mgmt. & Sec. Corp.*, 88 B.R. 730, 741 (Bankr. D. Md. 1988).

186 *Press-Enterprise II*, 478 U.S. at 8.

187 See Klaris et al., *supra* note 163, at 36 (“The First Amendment right of access is a qualified, not absolute, right. The qualified right to attend a government proceeding may be overcome where there is a showing of a countervailing, transcendent interest requiring closure.”).

contacts rule reveals that substantive citizen participation in commission-driven redistricting would carry immense “structural benefits.” To understand why, consider one case that has used *Press-Enterprise* to hold administrative proceedings open.

In *Detroit Free Press v. Ashcroft*, the U.S. Court of Appeals for the Sixth Circuit reviewed a challenge to the Immigration and Naturalization Service (INS) regulations, which forbade public access to “special interest” deportation hearings.¹⁸⁸ Finding that the administrative rule was in breach of the First Amendment, the court offered a ringing endorsement of openness as a check on government abuse.¹⁸⁹ Applying the *Press-Enterprise* test, the court concluded that public access to INS proceedings (1) ensured “fairly and properly” conducted hearings,¹⁹⁰ (2) improved government performance and accuracy,¹⁹¹ (3) had a “cathartic” effect on the community,¹⁹² (4) gave a “perception of integrity and fairness,”¹⁹³ and (5) promoted a more informed public.¹⁹⁴ Because those structural benefits were so compelling, the requirement that openness be historically supported was analytically less important.¹⁹⁵ The court, therefore, subjected the INS rule to strict scrutiny and found that the government’s interest in confidentiality was not narrowly tailored.¹⁹⁶

Aside from validating the *Press-Enterprise* test in the administrative context,¹⁹⁷ the Sixth Circuit’s “structural benefit” explanations are revealing. Although the five rationales were found in the ambit of immigration hearings, a court could easily find that they apply *with equal force* in the redistricting context.

188 See 303 F.3d 681 (6th Cir. 2002). The case arose from the government’s “special interest” prosecution of a Muslim man in Detroit who had overstayed his tourist visa. *Id.* at 683–85.

189 *Id.* at 683 (“The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation”).

190 *Id.* at 703–04 (“In an area such as immigration, where the government has nearly unlimited authority, the press and the public serve as perhaps the only check on abusive government practices.”).

191 *Id.* at 704 (“Congressional oversight hearings . . . can do little to correct past [mistakes]. In contrast, openness at the hearings can allow mistakes to be cured at once.” (quoting Soc’y of Prof’l. Journalists v. Sec’y of Labor, 616 F. Supp. 569, 575–76 (D. Utah 1985))).

192 *Id.* (“It is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorist attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals’ rights.” (quoting the district court below)).

193 *Id.* (“The most stringent safeguards for a deportee ‘would be of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding.” (quoting First Amendment Coal. v. Judicial Inquiry & Review Bd., 784 F.2d 467, 486 (3d Cir. 1986) (Adams, J., concurring))).

194 *Id.* at 704–05 (“Public access to deportation proceedings helps inform the public of the affairs of the government. Direct knowledge of how their government is operating enhances the public’s ability to affirm or protest government’s efforts.”).

195 *Id.* at 700 (The court rejected an argument that the tradition of openness in a hearing must date back to the time “when our organic laws were adopted.” Indeed, it observed, *Press-Enterprise II* had “relied on exclusively post-Bill of Rights history.”).

196 *Id.* at 705–07.

197 Accord Klaris et al., *supra* note 163, at 63 (“Due process obligations and a history of openness dating from the advent of the administrative state lead to the inexorable conclusion that the First Amendment’s presumptive right of access attaches to administrative adjudicatory proceedings.”).

Consider, for example, how each benefit would play out if commission-erected procedural barriers were struck down. First, allowing *ex parte* contacts with commissioners would foster “fair and proper” redistricting by ensuring that citizen feedback is incorporated into the electoral plan.¹⁹⁸ Second, *ex parte* contacts with redistricting officials would improve “government performance” by increasing the upstream flow of policy information related to line drawing.¹⁹⁹ Third, permitting *ex parte* contacts would be “cathartic” for citizens who might otherwise feel blocked out of the redistricting debate (especially in states like Arizona and California).²⁰⁰ Fourth, allowing *ex parte* contacts would foster “perceptions of integrity” by making unelected commissioners seem approachable.²⁰¹ And fifth, the incidence of *ex parte* contacts would create a more “informed public” by permitting commissioners to answer constituent-specific questions about a redistricting plan.²⁰²

Stepping back, the *Detroit Free Press* factors make clear that *ex parte* contacts are a necessary ingredient for “proximate petitioning.” This is an alarming conclusion given that *virtually all* redistricting commissions prohibit off-the-record communications. However, by invoking the Petition Clause to remove that procedural barrier, a court could reverse the harm to pluralism inflicted by the recent shift to commission-based redistricting.²⁰³ In *Press-Enterprise* parlance, re-democratizing electoral design would create significant “structural benefits.” Importantly, it would restore the Framers’ preference for a consensus model of redistricting, and it would countermand any negative consequences from the Supreme Court’s ruling in *Arizona Legislature*.²⁰⁴ Because these functional benefits are specific and articulable, the “history” prong of *Press-Enterprise* becomes an ancillary (albeit equally well-documented) consideration.²⁰⁵ Therefore, a court applying the test should be prepared to invalidate the *ex parte* contacts rule under strict scrutiny analysis.²⁰⁶

CONCLUSION: BROADER IMPLICATIONS?

The foregoing discussions show that procedural hurdles in the redistricting process may raise grave constitutional problems. At the same time, my analysis of how the *ex parte* contacts rule abridges petitioning is merely illustrative. At one level of abstraction, the First Amendment framework I present may also be useful for

198 See *supra* note 11 and accompanying text.

199 See *supra* note 79 and accompanying text.

200 See *supra* notes 81–83 and accompanying text.

201 See *supra* note 91 and accompanying text.

202 See *supra* note 14 and accompanying text.

203 See *supra* notes 88–90 and accompanying text.

204 See *supra* note 12 and accompanying text.

205 See *supra* note 191 and accompanying text. Notwithstanding that conclusion, there is little ground to argue that *ex parte* contacts have not traditionally been part of the redistricting process. To the contrary, it is their very incidence that *fueled* the redistricting reform movement.

206 One unanswered question is whether a redistricting-specific government interest can save the *ex parte* contacts rule. That assessment is beyond the scope of this Article, but we can surmise that a compelling justification with strong factual support will be required. See Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 (2012–13) (surveying the Court’s “new absolutist” approach to the First Amendment).

scrutinizing other rules that dilute access to commission-driven redistricting. At two levels of abstraction, my argument that procedural barriers abridge petitioning rights may be revealing in other policy areas outside of redistricting. And at three levels of abstraction, the idea that the Petition Clause provides an independent source of constitutional protection may be a boon to jurisprudence in the ambit of expressive freedom. Aside from those figurative conclusions, however, this Article seeks to make a more basic contribution. Fundamentally, presents one method by which courts can harness the Constitution to restore the Framers' vision for a pluralist electoral system. In no unclear terms, this Article draws a line in the sand for democratic choice.